UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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October 10, 2003

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Subject: ***Volkers v. Indiana Wesleyan University (In re Chad Allen Volkers)***
Adversary No. 03-5006
Chapter 7; Bankr. No. 03-50038

Dear Messrs. Claggett and Nash:

The matter before the Court is Defendant Indiana Wesleyan University's ("IWU") motion for summary judgment. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I). This letter decision and accompanying order shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, IWU's motion shall be granted.

Facts. Debtor-Plaintiff Chad Allen Volkers ("Volkers") graduated from IWU in 1997.[1] He financed his education there, at least in part, through the student loan that is the subject of this adversary proceeding. Volkers has made no payments on that student loan. With accrued interest, he now owes IWU approximately $15,000.00.

Volkers filed a petition for relief under chapter 7 of the bankruptcy code on January 21, 2003. He included IWU's claim on his Schedule F. He commenced this adversary proceeding by filing a complaint on April 28, 2003. IWU answered Volkers' complaint on May 22, 2003.

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[1] Volkers alleges in his objection to IWU's motion for summary judgment that IWU is withholding his degree, which, if true, could amount to a violation of the automatic stay, for which IWU could be sanctioned. *See, e.g., Carson v. Logan College of Chiropractic (In re Carson)*, 150 B.R. 228, 231 (Bankr. E.D. Mo. 1993). However, that question is not before the Court at this time.

After taking Volkers' deposition on July 14, 2003, IWU filed a motion for summary judgment on July 24, 2003. IWU supported its motion with excerpts from Volkers' deposition. Volkers objected to IWU's motion for summary judgment on August 26, 2003. Volkers supported his objection with an affidavit in which he first revised the monthly income and expense figures contained in the Schedules I and J he filed with his petition and then described certain additional expenses he felt he needed to incur.

Volkers is 35-years old. He is single and lives with a roommate in an apartment he moved into sometime after filing his chapter 7 petition. He suffers from ADHD and depression. He is not otherwise physically or mentally disabled.

Volkers is employed as a computer technician in Spearfish, South Dakota. He has held this position for approximately two years. He earns $1,920.00 per month, from which he claims to have $400.00 deducted for payroll taxes and social security. He receives an additional $270.00 per month from his roommate. According to his affidavit, his monthly expenses total $1,850.75.

Summary Judgment. Summary judgment is appropriate when "there is no genuine issue [of] material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Bankr.P. 7056 and Fed.R.Civ.P. 56(c). An issue of material fact is *genuine* if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (quotes therein). A genuine issue of fact is *material* if it might affect the outcome of the case. *Id.* (quotes therein).

The matter must be viewed in the light most favorable to the party opposing the motion. *F.D.I.C. v. Bell*, 106 F.3d 258, 263 (8th Cir. 1997); *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1490 (8th Circ. 1992) (quoting therein *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587-88 (1986), and citations therein). Where motive and intent are at issue, disposition of the matter by summary judgment may be more difficult. *Cf. Amerinet*, 972 F.2d at 1490 (citation omitted).

The movant meets his burden if he shows the record does not contain a genuine issue of material fact and he points out that part of the record that bears out his assertion. *Handeen v. LeMaire*, 112 F.3d 1339, 1346 (8th Cir. 1997) (quoting therein *City of Mt. Pleasant v. Associated Electric Coop*, 838 F.2d 268, 273, (8th Cir. 1988). No defense to an insufficient showing is required. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 156 (1970) (citation therein); *Handeen*, 112 F.3d at 1346.

If the movant meets his burden, however, the non movant, to defeat the motion, "must advance specific facts to create a genuine issue of material fact for trial." *Bell*, 106 F.3d at 263 (quoting

Rolscreen Co. v. Pella Products of St. Louis, Inc., 64 F.3d 1202, 1211 (8th Cir. 1995)). The non movant must do more than show there is some metaphysical doubt; he must show he will be able to put on admissible evidence at trial proving his allegations. *Bell*, 106 F.3d 263 (citing *Kiemele v. Soo Line R.R. Co.*, 93 F.3d 472, 474 (8th Cir. 1996), and *JRT, Inc. v. TCBY System, Inc.*, 52 F.3d 734, 737 (8th Cir. 1995).

Dischargeability. Pursuant to 11 U.S.C. § 523(a)(8), a student loan is not dischargeable, unless "excepting such debt from discharge . . . will impose an undue hardship on the debtor and the debtor's dependents."[2] A debtor seeking to except a student loan from discharge bears the burden of proving "undue hardship" by a preponderance of the evidence. *Long v. Educational Credit Management Corp.* (*In re Long*), 292 B.R. 635, 638 (B.A.P. 8th Cir. 2003) (citations therein).

In the Eighth Circuit, a bankruptcy court must evaluate the "totality of the circumstances" in determining whether excepting a given student loan from discharge would impose an undue hardship on the debtor. *Long v. Educational Credit Management Corporation* (*In re Long*), 322 F.3d 549, 553 (8th Cir. 2003).

> In evaluating the totality-of-the-circumstances, our bankruptcy reviewing courts should consider: (1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and her dependent's reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case.

Id. at 554 (citation omitted). However, "if the debtor's reasonable future financial resources will sufficiently cover payment of the student loan debt - while still allowing for a minimal standard of living - then the debt should not be discharged." *Id.* at 554-55.

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[2] In his objection to IWU's motion for summary judgment, Volkers makes passing reference to the fact that the debt owed to IWU may not be for an "educational benefit, overpayment or loan made, insured or guaranteed by a governmental unit" (inexplicably omitting the balance of § 528(a)(8), which continues, "or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend . . ."). Volkers did not claim in his complaint that IWU's student loan did not qualify under 11 U.S.C. § 523(a)(8) and he did not offer any evidence in support of such a claim. Moreover, by seeking a determination of "undue hardship," Volkers has at least implicitly admitted IWU's student loan falls within the parameters of § 528(a)(8).

Discussion. The relevant facts are not in dispute. Volkers is gainfully employed and has held the same position for two years. He has made no claim that he will not continue to be employed in that position. According to the affidavit he filed in support of his objection to IWU's motion for summary judgment, Volkers earns $1,920.00 per month. He has $400.00 deducted for payroll taxes and social security. He takes home $1,520.00. In addition, Volkers receives $270.00 per month from his roommate for his roommate's share of the rent and the cost of purchasing a dryer. At a minimum, therefore, Volkers' monthly net income totals $1,790.00.[3]

According to his affidavit, Volkers' monthly expenses total $1,850.75.[4] Volkers' figures do not include the sum of $100.00 per month he is now obligated to pay the United States Department of Education beginning January 1, 2004, pursuant to the Court's Order Adopting Consent Judgment and Ordering Judgment in *Volkers v. United States Department of Education* (*In re Volkers*), No. 03-5005 (Bankr. D.S.D. Sep. 23, 2003). Volkers has no dependents. While his monthly expenses may currently exceed his monthly net income, several of those expenses appear to be relatively short-term. For example, his automobile payment of $253.00 will eventually satisfy the loan against his automobile.[5] Likewise, his dryer payment of $40.00 will eventually satisfy the loan against his dryer (or the installment contract under which it was purchased). The same can

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[3] According to the Schedule I he filed with his petition, Volkers has only $300.00 deducted for payroll taxes and social security but has $100.00 deducted for "Advance Repayment." While the bottom line may be the same as in his affidavit, Volkers has offered no explanation of the different figures used for payroll taxes and social security or disclosed the nature of the "Advance Repayment," whether that $100.00 is still being deducted, and, if so, for how much longer. It is therefore entirely possible that Volkers' monthly net income may total $1,890.00, either now or in the very near future.

[4] According to the Schedule J he filed with his petition, Volkers' monthly expenses total $1,895.00, which includes a $500.00 payment for "Student Loan." Nothing in the record suggests Volkers was making this payment at the time he filed his Schedule J.

[5] Volkers has not provided any information regarding his automobile. He did list an automobile payment ($230.00) on the Schedule J he filed with his petition. However, he did not list an automobile on his Schedule B or claim an automobile exempt on his Schedule C. He did not list an automobile loan on his Schedule D or an automobile lease on his Schedule G. Finally, he did not disclose an intent to surrender or retain an automobile on his Statement of Intention.

be said about the $50.00 payment to "Andy Iverson for Loan for Moving Expenses" and the $100.00 payment to his attorney.[6]

While Volkers has not provided any information that would enable the Court to determine precisely when these payments will end, it is readily apparent that at some point in the not-too-distant future, Volkers' monthly expenses will be reduced by these sums. At that point, according to his numbers, Volkers will have monthly expenses of $1,507.75 (including his payment to the United States Department of Education), leaving him, at a minimum, $262.25 per month to make payments against the IWU student loan and cover at least some of the additional expenses described in his affidavit.[7] Were Volkers to reduce his spending for such items as internet, cell phone, clothing, and transportation even slightly, the resulting savings would increase the amount he would have available to pay toward the IWU student loan and his other monthly expenses.

Volkers has made only a minimal showing of other facts and circumstances surrounding his case. It appears he suffers from ADHD and depression. However, he has made no showing that either condition adversely affects his ability to earn a living. It also appears he has certain additional expenses he would like to incur. However, he has deferred those expenses for some time. He has made no showing that he could not continue to defer them or that, even with careful planning, he could not adjust his monthly budget to allow for them, without sacrificing his ability to make payments against the IWU student loan.

Volkers has not shown that his financial situation will not improve. It would not be unreasonable to assume he might receive a raise or find a better-paying job in the years to come. He has not shown that he has attempted to work out an arrangement with IWU or that he has been unable, despite his best efforts, to abide by the terms of any such arrangement. Indeed, he admits he has made no payments whatsoever on the IWU student loan. He has not

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[6] Any claim for fees for services rendered pre-petition has been discharged, *see In re Hankins*, No. 01-41241, slip op. at 6 (Bankr. D.S.D. May 9, 2003). Thus, the payment to Volkers' attorney would only be appropriate if it is for services rendered post-petition. However, the record does not reflect that Volkers' attorney has submitted a supplemental disclosure of compensation in compliance with Fed.R.Bankr.P. 2016(b) and LBR 2016-1(a).

[7] The Court's calculations include a reduction of $20.00 in Volkers' monthly net income, in recognition of the fact that once Volkers' dryer has been paid for, his roommate will no longer be paying him that sum each month.

explained why his withholding for payroll taxes and social security has increased by $100.00 since he filed his Schedule I. He has not explained how he has a monthly car payment, when according to his Schedule B, he does not own a car, and according to his Schedule G, he does not rent a car.

While Volkers' financial situation is far from ideal, the Court is left with the firm conviction that Volkers has not made a serious effort to repay IWU's student loan and the equally firm conviction that if here were to make the effort, he could do so. That differentiates him from the debtors in other cases in which the courts have found undue hardship. *See, e.g., Strand v. Sallie Mae Servicing Corporation* (*In re Strand*), 298 B.R. 367 (Bankr. D. Minn. 2003) (54-year-old man with dyslexia, heart disease, diabetes, arthritis, diarrhea, depression, and posttraumatic stress disorder entitled to discharge of $130,000.00 student loan debt); *Korhonen v. Educational Credit Management Corporation* (*In re Korhonen*), 296 B.R. 492 (Bankr. D. Minn. 2003) (42-year-old homeless man with physical and mental disabilities and an income below the poverty level entitled to discharge of $110,000 student loan debt). Having considered the totality of the circumstances in this case, the Court concludes that excepting the IWU student loan from discharge will not impose an undue hardship on Volkers.[8]

Volkers has failed to advance specific facts to create a genuine issue of material fact for trial. IWU is entitled to judgment as a matter of law. IWU's motion for summary judgment is therefore granted. The Court will enter an appropriate order.

Sincerely,

Irvin N. Hoyt
Bankruptcy Judge

IH: sh

cc: adversary file (docket original in adversary; serve copies on counsel)

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[8] The Court's only options under 11 U.S.C. § 523(a)(8) are to grant or deny a discharge of Volkers' student loan debt. The Court cannot fashion a "reasonable" amount that Debtor should repay. Nevertheless, the Court trusts IWU will recognize the realities of Volkers' financial situation and will work cooperatively with him to explore all reasonable means for repaying this student loan.

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